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Order 2000-4-22
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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 21st day of April, 2000

Joint Application of

**AMERICAN AIRLINES, INC.,
SWISSAIR, SWISS AIR TRANSPORT
COMPANY, LTD. and
N.V. SABENA S.A.**

under 49 U.S.C. §§ 41308 and 41309 for approval of and antitrust immunity for alliance agreements

Docket OST-1999-6528 - / /

ORDER TO SHOW CAUSE

By this order, we tentatively grant approval of and antitrust immunity for (1) an Alliance Agreement[1] between American Airlines, Inc. ("American") and Swissair, Swiss Air Transport Company, Ltd. ("Swissair"); (2) an Alliance Agreement[2] between American and N.V. Sabena S.A. ("Sabena"); and (3) a Coordination Agreement[3] among American, Sabena, and Swissair, including their affiliates, collectively referred to as the "Alliance Agreements," under 49 U.S.C. §§ 41308 and 41309. If made final, we will direct the Joint Applicants to resubmit their Alliance Agreements to the Department for review no later than five years from the service date of the Final Order. If the Joint Applicants choose to operate under a common name or brand, they will have to obtain advance approval from the Department before implementing the arrangement.

As an express condition of the grant of antitrust immunity to the Alliance, we also direct American, Sabena, and Swissair to withdraw from all International Air Transport Association ("IATA") tariff conference activities affecting through prices between the United States and Belgium and Switzerland and for other markets described below. We further propose to direct Sabena and Swissair to continue reporting full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by their partner American). We further tentatively find it appropriate to condition our approval as more fully explained below.

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1 See Exhibit JA-1.

2 See Exhibit JA-2.

3 See Exhibit JA-3.

We are providing American, Sabena, and Swissair, and other interested parties the opportunity to comment on these tentative findings.

I. Background

A. Delta-Austrian-Sabena-Swissair Alliance Agreements

By Order 96-6-33, issued June 14, 1996, the Department previously granted antitrust immunity to the business arrangements among Delta Air Lines, Inc., Austrian Airlines, Sabena, and Swissair providing for certain coordinated airline service.

On January 18, Austrian Airlines notified the Department that its alliance arrangement with Delta, including code sharing, would end on March 25, 2000.[4]

By notification dated February 17, Sabena and Swissair informed the Department that their cooperation with Delta would end on August 5, 2000. The Joint Applicants also informed the Department that they intend to commence their proposed cooperative activities on August 6, 2000.

B. The U.S.-Belgium and U.S.-Switzerland Open-Skies Agreements

We exchanged diplomatic notes finalizing the Open-Skies Accords with Switzerland on June 15, 1995, and with Belgium on September 5, 1995. The predicate for our approval and grant of antitrust immunity for the American-Sabena-Swissair alliance is the existence of the expansive aviation agreements between the U.S. and Belgium and between the U.S. and Switzerland. These accords allow any U.S. airline to serve any point in Belgium and Switzerland (and open intermediate and beyond rights) from any point in the United States and allow any Belgium and Swiss airline to do the same. Each of these open-skies accords has encouraged more competitive service to Belgium and Switzerland. Since market forces, not restrictive agreements, have disciplined the price and quality of U.S.-Belgium and U.S.-Switzerland airline service, U.S. travelers have had an incentive to travel through Belgium and Switzerland to points beyond, in competition with services offered through other European gateways.

II. The American-Sabena-Swissair Alliance Agreements

The joint application concerns three agreements: (1) an Alliance Agreement between American and Swissair, (2) an Alliance Agreement between American and Sabena S.A., and (3) a Coordination Agreement among American, Sabena, and Swissair. The Joint Applicants maintain that the proposed arrangement is comparable to the Delta-Austrian-Sabena-Swissair alliance and the recently approved Northwest-KLM-Alitalia alliance in that it provides a contractual

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[4] See Docket OST-2000-6803. Joint Application of United Air Lines and Austrian Airlines, fn. 1.

framework for cooperation in all major functional areas of the airlines' operations, while the Coordination Agreement provides for integration of all three carriers as a single operational entity.

For example, the Alliance Agreements provide for route and schedule planning and coordination; establishment and management of marketing, advertising, sales and distribution networks, staffs, programs, policies, and systems; coordination and integration of frequent flyer programs; code sharing; coordinated pricing, inventory and yield management; revenue pooling and sharing; joint procurement of goods and services; coordinated cargo programs and distribution of cargo services; integration design, and development of information systems (including inventory control and yield management functions); coordination of revenue and cost accounting practices; sharing of facilities and services at airports; provision of aircraft and ground equipment and technical and maintenance services; and the establishment of an Alliance Committee to administer coordination and to oversee and manage the partners' cooperative activities.

In short, the proposed Alliance Agreements, if approved, will allow the Joint Applicants effectively to operate much as a single-firm, while retaining their individual identities, brands, ownership, and control. The joint application does not involve any exchange of equity or other forms of cross-ownership.

III. The Application and Responsive Pleadings

A. The Joint Application

On November 19, 1999, the Joint Applicants filed an application seeking approval of and antitrust immunity for the Alliance Agreements, for at least a five-year term. They state that the purpose of the proposed arrangement is to establish a legal framework enabling them to expand their existing code-share relationship, while permitting each of the three partners to retain its independent corporate and national identity.[5] While the arrangement does not involve any exchange of equity or other forms of cross-ownership,[6] they state that the objective of the Alliance Agreements is to enable the partners to plan and coordinate service over their respective route networks as if they were a single entity. Moreover, the Joint Applicants state that the proposed alliance is not part of "Oneworld",[7] and that there are no plans to link the two.[8] They state that the proposed alliance involves price and service coordination that would expose them to potential antitrust liability. Therefore, they state that

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5 Application at 3.

6 Application at 6.

7 Oneworld is a global alliance comprised of American, British Airways, Canadian Airlines, Cathay Pacific Airways, Finnair, Iberia, and Qantas Airways.

8 Application at 6.

they will not go forward with their plans absent antitrust immunity, and that their alliance agreements so provide.[9]

The Joint Applicants assert that the public and commercial benefits promoted by the proposed arrangement and U.S. international aviation policy support granting their request. They represent that their alliance will produce significant network synergies by creating a coordinated network of competitive services in the U.S.-Belgium and U.S.-Switzerland markets and beyond, and by producing cost efficiencies and savings through integration and coordination that can be passed on to consumers, as global competition between alliances increases. They maintain that the alliance will create a seamless American-Sabena-Swissair network that will enhance competition in the U.S.-Belgium-Switzerland markets and the worldwide marketplace by enabling the partners to compete with other global alliances, thereby increasing global competition. The Joint Applicants hold the view that the alliance cannot achieve the expected benefits and efficiencies absent antitrust immunity.

The Joint Applicants state that the proposed alliance will not substantially reduce or eliminate competition in any relevant market. Indeed, they argue that a fully implemented alliance will enable them to increase their competitiveness, creating additional consumer choice and enhanced competition in the international marketplace.

In the U.S.-Europe market, the Joint Applicants assert that the alliance's market share will be smaller than the United-Lufthansa-SAS alliance, and that it will be about the same size as the Northwest-KLM-Alitalia alliance.[10] Noting that the foreign partners provide on-line traffic to a number of European cities, the Joint Applicants state that the proposed alliance will be directly competitive with United-Lufthansa-SAS and Northwest-KLM-Alitalia in providing on-line service to/from many beyond-gateway points in Europe. They also maintain that the alliance's presence at Zurich and Brussels, as measured by share of departures to U.S. points, will be comparable to that of the other immunized alliances at their respective European hubs.

Regarding the U.S.-Brussels and U.S.-Switzerland markets, the Joint Applicants argue that many U.S. and other foreign airlines now provide nonstop and on-line connecting services in the U.S.-Belgium and Switzerland markets.[11] Moreover, the Joint Applicants note that under

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[9] Application at 15. Also, see Article 3.2 of each Alliance Agreement.

[10] For the year ended August 31, 1999, the Joint Applicants' analysis of U.S.-Europe O&D passenger bookings indicates that the United-Lufthansa-SAS alliance market share was about 19 percent; the Northwest-KLM-Alitalia alliance market share was about 12 percent; and the American-Sabena-Swissair alliance market share would have been about 12 percent. By comparison, the Delta-Austrian-Sabena-Swissair alliance market share was about 16 percent. Application at 16-17.

[11] American, Biman Bangladesh, City Bird, Continental Airlines, Delta Air Lines, United Airlines, and Sabena provide scheduled, nonstop service in the U.S.-Belgium market. American, Continental Airlines, Delta Air Lines, and Swissair provide scheduled, nonstop service in the U.S.-Switzerland market. Source: Official Airline Guides, Inc., January 2000.

the U.S.-Belgium and U.S.-Switzerland open-skies agreements, there are unlimited opportunities for additional entry by U.S. airlines from any U.S. point.

Regarding the city-pair markets, the Joint Applicants note that the proposed alliance has two overlapping nonstop city-pairs: Chicago-Brussels and Chicago-Zurich.[12] Nevertheless, they argue that the alliance's market presence in these two city pairs will be disciplined by several competitive factors. For example, they note that each of these city-pair markets is subject to nonstop entry at any time by another competing U.S. airline. Moreover, they maintain that a number of U.S. airlines already provide ample one-stop, on-line connecting service in the Chicago-Brussels/Zurich markets.[13] In addition, they argue that a large percentage of the traffic on American's/Swissair's Chicago-Zurich flights and American's/Sabena's Chicago-Brussels flights is flow traffic.[14] The Joint Applicants maintain that they will face vigorous competition for flow traffic by Delta Air Lines at Atlanta and New York (JFK Airport), by Continental Airlines at Newark, and by United Airlines at Washington (Dulles Airport).

The Joint Applicants also maintain that approval of their application will promote aviation liberalization, development of competitive airline networks and provide other public benefits including increased trade ties and job opportunities.

Finally, the Joint Applicants state that the grant of antitrust immunity here should also cover the coordination of (1) the presentation and sale of the carriers' airline services in a computer reservations system ("CRS"), and (2) the operations of their respective international reservations systems. The Joint Applicants state that they are prepared to consent to the imposition of the condition prohibiting participation in certain IATA tariff coordination activities. They are prepared to consent to a condition restricting the use of a common service name or brand absent separate approval by the Department, and they agree to accept the O&D Survey data-reporting requirement, consistent with the Department's actions in other antitrust immunity cases.

B. Responsive Pleadings[15]

On December 29, 1999, Legend Airlines filed a request asking the Department to take no action on the application. The carrier maintains that its request is warranted, based on its view that American has engaged in anticompetitive behavior in the Dallas-Ft. Worth market. Legend argues that American has engaged in anticompetitive actions to "maintain its control" over that market and to block new entrants from entering the market. It also cites a separate

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[12] On February 4, the Joint Applicants filed a reply informing the Department that, effective June 1, 2000, American will shift its Chicago-Zurich nonstop service to Dallas-Fort Worth.

[13] Application at 21.

[14] Application at 21-22.

[15] By Notice dated January 7, 2000, the Department provided interested parties interim access to the non-public record of this case, required that answers to the application be filed no later than January 28, and that replies be filed no later than February 8.

complaint brought by the Department of Justice against American supporting its assertion in this matter.[16] Legend argues that any attempt by American to gain additional international authority should be deferred by the Department until American demonstrates that its "behavior is consistent with the principles of deregulation and federal law."

On February 4, 2000, the Joint Applicants filed a reply urging the Department to promptly conclude this proceeding. American also notified the Department that it intends to shift its Chicago-Zurich nonstop service to Dallas-Fort Worth, effective June 1. As a result, it will no longer operate overlapping nonstop service with Swissair in this city-pair market.

IV. Tentative Decision

We tentatively find that approving and granting antitrust immunity to the Alliance Agreements under §§ 41308 and 41309 is in the public interest, subject to conditions. If made final, we will require the Joint Applicants (1) to withdraw from all IATA tariff conference activities relating to through prices between the United States and Belgium and the United States and Switzerland, as well as between the United States and the homeland(s) of foreign airlines participating with U.S. airlines in other immunized alliances; (2) to file all subsidiary and subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for renewal their Alliance Agreements within five years of the issuance of a final decision in this case. We also tentatively find it in the public interest to direct Sabena and Swissair to continue reporting full-itinerary O&D Survey data for all passenger itineraries that contain a point in the United States (similar to the O&D data already reported by American).

Our decision in this case rests on an examination of the impact of the proposed alliance on competition and the public interest in the subject markets. Antitrust immunity allows the partner airlines to engage in price and service coordination to an extent not permitted under the normal operation of U.S. antitrust laws.[17] We will consider granting antitrust immunity if our evaluation finds the proposed transaction to be on balance pro-competitive, pro-consumer, and consistent with our international aviation competition policy. The right to engage in price and service coordination is not, of course, transferable as alliance partner's change. A determination as to whether a particular transaction is consistent with the public interest is made only on a case-by-case basis and in light of the specific facts and circumstances affecting that case.[18]

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[16] United States v. American Airlines, Inc., Civil Action No.: 99-1180-JTM, filed May 13, 1999.

[17] Notwithstanding, the immunized partners are required to conduct their operations consistent with applicable U.S. laws and regulations.

[18] As the pattern of international alliances changes and matures, relationships involving more carriers and more markets are likely, and some of these relationships might involve factual situations and competition concerns for which our previous considerations of requests for antitrust immunity do not provide as clear a guide.

Here we have conducted a full *de novo* examination of the merits of the joint application filed in this proceeding. We have assessed the impact of the new alliance on competition and the overall public interest in light of the facts and circumstances that are likely to affect the outcome of this case. In order to assess that impact, the Joint Applicants have provided the record with detailed evidence in response to the Department's tailored request to address the issues raised by their application, and we have provided all interested parties the opportunity to comment on the merits of that application.

V. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required in the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that the public interest requires that we grant antitrust immunity.

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[19] The Department cannot approve an inter-carrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved, by reasonably available alternatives that are materially less anticompetitive.[20] The public benefits include international comity and foreign policy considerations.[21]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[22] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[23]

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19 Section 41309(b).

20 Section 41309(b)(1)(A) and (B).

21 Section 41309(b)(1)(A).

22 Section 41309(c)(2).

23 Section 41309(c)(2).

VI. Tentative Approval of the Alliance Agreements

The Market Summary

The U.S.-Belgium and U.S.-Switzerland markets are two important international aviation markets. Both markets are governed by open-skies agreements that have eliminated barriers to new entry, expansion, and competition created by government regulation in the U.S.-Belgium and U.S.-Switzerland markets. These agreements provided unrestricted competitive opportunities for all U.S., Belgium and Swiss airlines, including the flexibility to operate their own direct services, or joint services with another airline. The open-skies agreements recognized the value of airline networks and provided open opportunities for competitive alliances to provide the services covered by the new accords.

The Department has examined and found substantial consumer and competitive benefits ensuing from each of the open-skies agreements and from the structural changes that have occurred in the global airline system, such as alliances.[24] The principal purpose of the agreements now before us is to create a new alliance involving American, Sabena, and Swissair.

The Belgium and Switzerland open-skies regimes have produced a more competitive aviation environment and they have provided airlines with the opportunity to implement new initiatives for serving local, regional, and global markets.

Four U.S. airlines provide scheduled U.S.-Belgium passenger service: American (Chicago), Continental (Newark), Delta (Atlanta and New York), and United (Washington). These airlines offer five daily frequencies per day in the market. Three U.S. airlines provide U.S.-Switzerland scheduled passenger service: American (Chicago), Continental (Newark), and Delta (Atlanta and Cincinnati). These airlines offer four daily frequencies per day in the market. Each U.S. airline operates to Belgium and Switzerland from at least one of its hubs, permitting it to offer passengers throughout the country extensive online connecting service.

Sabena and City Bird are the only Belgian providers of U.S.-Belgium scheduled passenger service. Sabena provides more service in the market than any other airline. Sabena's market share is approximately 57 percent.

Swissair is the only Swiss provider of U.S.-Switzerland scheduled passenger service. It provides more service in the market than any other airline. Swissair's market share is approximately 70 percent.

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[24] See *International Aviation Developments: Global Deregulation Takes Off* (First Report), U.S. Department of Transportation, Office of the Secretary, December 1999.

American provides daily, scheduled passenger service in the Chicago-Brussels and Chicago-Zurich markets. American's market share in these city-pair markets is approximately 7 percent and 6 percent, respectively.

It is against this fully competitive background that we have tentatively decided to approve and grant antitrust immunity to the American-Sabena-Swissair alliance agreements before us, subject to the conditions noted.

Public Benefit Summary

We tentatively find that the proposed alliance would provide important public benefits. We have determined that the pro-competitive effect of global alliances is particularly evident in the case of the behind- and beyond-markets where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond mere interlining.[25] Integrated alliances can, in short, offer a multitude of new on-line services to thousands of city-pair markets, on a global basis. In this case, the record shows that American serves 240 points worldwide, Swissair serves 139, and Sabena serves 98. Importantly, the record indicates that the integration of their three networks will create up to 33,600 new on-line markets. Thus, the proposed alliance will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities beyond and behind major gateways. Our recent evaluation of international alliances shows that they stimulate traffic in these connecting markets and thereby increase competition and service options in the overall international market and increase overall opportunities for the traveling public and the aviation industry.[26] The proposed alliance should also allow the Joint Applicants to improve the efficiency of their operations and to otherwise work together to improve service between the U.S. and Belgium-Switzerland and between the U.S. and other international destinations.[27]

Moreover, approval of the proposed alliance would facilitate the implementation of the open-skies agreements with Belgium and Switzerland and allow the Joint Applicants to implement the proposed coordinated activities so as to use more efficiently the opportunities that are available to them by these accords.

Competitive Summary

We also tentatively find that it is unlikely that these alliance agreements would substantially reduce or eliminate competition in any relevant market, as conditioned. American now provides nonstop service in the Chicago-Brussels and Chicago-Zurich markets in competition with Sabena and Swissair, respectively. The significant competitive issue presented in this

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[25] See Order 96-5-12 at 17-18.

[26] See International Aviation Developments: Global Deregulation Takes Off (First Report). U.S. Department of Transportation, Office of the Secretary, December 1999.

[27] See Application at 6-11.

case is that Chicago will lose American's nonstop competition upon implementation of the proposed alliance. We have thus tentatively decided to impose conditions on our approval in this case to maintain competition and consumer choice of services in the Chicago-Brussels and Chicago-Zurich markets. However, considering the open-entry nature of these markets in an open-skies regime, we tentatively find that the likelihood of potential entry from Chicago and the competitive discipline afforded by competing U.S. hubs and existing competition from one-stop and connecting services should provide competitive discipline for these two markets, if the Joint Applicants should charge supra-competitive fares or lower service below competitive levels, except as to certain time-sensitive passengers.

Approval of the alliance will increase the presence and market share of the alliance partners in the U.S.-Europe market. It could also increase concentration, but only slightly.[28] More importantly, the record shows that the proposed alliance will face vigorous competition from other airlines and alliances in the U.S.-Europe market.

We have reached the same tentative conclusion with respect to the U.S.-Belgium and U.S.-Switzerland markets. The record shows that there is no significant competitive overlap among the Joint Applicants in these markets. Therefore, approval of the alliance will not substantially reduce competition.

A. Antitrust Issues

The Joint Applicants state that the proposed arrangement is intended to create a framework that will allow them to cooperate in order to improve efficiency, expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreements' intended commercial and business effects are equivalent to those resulting from a merger of the three airlines. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[29]

The Clayton Act test requires the Department to consider whether the Alliance Agreements will substantially reduce competition by eliminating actual or potential competition between American, Sabena, and Swissair so that they would be able to produce supra-competitive pricing or reduce service below competitive levels.[30] To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Department considers whether the transaction is likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive

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28 See U.S.-Europe Market Analysis, below.

29 Order 92-11-27 at 13.

30 *Id.*

levels). To determine whether a proposed merger is likely to create or enhance market power, we primarily consider whether the merger would significantly increase concentration in the relevant markets, whether the merger raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

The relevant markets requiring a competitive analysis are: first, the U.S.-Europe market; second, the U.S.-Belgium and U.S.-Switzerland markets; and third, the city-pair markets.

1. U.S.-Europe Market Analysis[31]

We tentatively find that the Alliance Agreements should not diminish competition in the U.S.-Europe marketplace. In terms of passenger bookings, American is the third largest U.S.-flag carrier in the U.S.-Europe market, and fifth overall.[32] During the 12 months ended June 1999, American's U.S.-Europe nonstop passenger market share was 8.2 percent. The proposed alliance passenger market share (including Sabena, 1.7 percent; and Swissair, 3.2 percent) was 13.2 percent. In contrast, the Delta-Austrian Airlines-Sabena-Swissair immunized alliance had a 14.8 percent passenger market share; the United-Lufthansa-Scandinavian Airlines immunized alliance had a 17.1 percent passenger market share; and the Northwest-Alitalia-KLM immunized alliance had an 11.2 percent passenger market share.

The U.S.-Europe marketplace is highly competitive. Eight U.S. airlines provide scheduled passenger service in this market from their hubs, either individually or in conjunction with an existing alliance. The U.S.-Europe market is also served by more than thirty foreign airlines, principally from hubs in their homelands.

2. U.S.-Brussels and Switzerland Market Analysis[33]

In the U.S.-Belgium market, Sabena had the largest market share with 56.7 percent. By comparison, Delta had 17.7 percent; United had 8.2 percent; American had 6.9 percent; City Bird had 4.3 percent; and Continental had 4.2 percent.

In the U.S.-Switzerland market, Swissair had the largest market share with 69.8 percent. By comparison, Delta had 11.9 percent; Austrian had 7 percent; American had 5.6 percent; and Continental had 2.7 percent.

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31 Source: T-100 and T-100(f) nonstop segment and market data, for the 12 months ended June 1999.

32 See Exhibit JA-13.

33 Source: T100 and T100(f) nonstop segment and market data, for the 12 months ended September 1999.

In these circumstances, the proposed American-Sabena-Swissair alliance will have the largest share of the U.S.-Belgium and U.S.-Zurich markets. Nonetheless, based on our evaluation, we do not find that the proposed alliance will allow the Joint Applicants to charge supra-competitive prices or to reduce service below competitive levels in these country-to-country markets.

As we noted above, these markets are governed by open-skies agreements that eliminate all barriers to entry and provide the opportunity for other airlines to freely enter and meet the needs of consumers in these markets. U.S. airlines have made effective use of these opportunities. Currently, three U.S. airlines besides American operate nonstop flights to Brussels, and two airlines besides American operate nonstop flights to Zurich, as discussed above. It is also significant that other U.S. airlines are parties to airline alliances that offer additional competitive options in the U.S.-Belgium and U.S.-Switzerland markets over their networks, such as the Delta-Air France, Northwest-KLM-Alitalia, and United-Lufthansa-Scandinavia alliances.

These considerations support a tentative finding that it is likely that the services of the proposed alliance will be effectively disciplined by competition provided by other airline services in the market.

3. The City-Pair Markets

We have reached the same tentative conclusion with respect to the city-pair markets at issue here, except for time-sensitive travel in the Chicago-Brussels and Chicago-Zurich markets.

These are large and important international aviation markets, as illustrated by the fact that they generated more than 1,000 passengers a day last year. Since nearly eighty percent of all such passengers used the services of one or more of the Joint Applicants, we are concerned that the proposed alliance could substantially increase concentration and reduce competition in the Chicago-Brussels and Chicago-Zurich markets.

The joint applicants maintain that their proposed alliance will not have these effects for several reasons.

First, they state that the Chicago metropolitan area is one of the largest air traffic hubs in the United States. It is also the second largest traffic generating point in the United States-Europe market. Consequently, the Chicago market is most attractive to new carrier entry in the event of supra-competitive fare levels.

Second, they state that potential new entry in the Chicago market would not be required to overcome an American-dominated hub. For the twelve months ended June 1999, the United-Lufthansa-SAS immunized alliance transported as many passengers in Chicago's international markets as the Joint Applicants.

Third, they note that other airlines provide competitive on-line connecting service between Chicago and both Brussels and Zurich.

We have determined that these considerations satisfy some, but not all, of our concerns about the competitive effects of the proposed alliance on Chicago-Brussels and Chicago-Zurich consumers.

As touched on above, other U.S. airlines offer on-line connecting service to Brussels and Zurich via other gateways. Chicago-Zurich passengers can travel on Delta via its Atlanta and Cincinnati hubs; and on Continental via its Newark hub. Chicago-Brussels passengers can travel on Delta via New York and its Atlanta hub; on Continental via its Newark hub; and on United via its Washington hub. These services should provide a competitive alternative for the bulk of passengers whose greater flexibility in time of travel permits them readily to take advantage of competing one-stop and connecting fares on other airlines.[34]

However, we cannot reach the same conclusion with respect to time-sensitive travelers in the markets. They are most at risk in this case because many of these passengers depend on nonstop service to meet their travel needs, and would lose the benefit of competitive nonstop service upon implementation of the proposed alliance. To minimize that risk and to maximize competition in the Chicago-Brussels and Chicago-Zurich markets, we have tentatively decided to deny the Joint Applicants' request for authority to engage in coordination for time-sensitive passengers traveling on certain "unrestricted fares" (i.e., published fares not requiring either a Saturday night stay or a stay of seven days or more).[35]

4. The Behind- and Beyond-Gateway Markets

As we have noted, the pro-competitive effects of global alliances can be particularly evident in the case of the behind- and beyond-gateway markets, where many passengers lack convenient on-line service, and where integrated alliances with coordinated connections, marketing, and services can offer competition well beyond traditional interlining. For example, we estimate that the Delta-Sabena-Swissair partnership provided enhanced on-line connecting opportunities in nearly 27,500 city-pair markets. We estimate that the dissolution of this alliance will result in about 14,000 city-pair markets losing on-line connecting opportunities. The Joint Applicants' analysis indicates that the proposed American-Sabena-Swissair alliance will create up to 33,600 new on-line city-pair markets from the integration of their three networks (American serves 240 points worldwide; Swissair serves 139; and Sabena serves 98). Importantly, our analysis of the proposed partnership indicates that it will restore on-line connecting opportunities to about 11,800 of the 14,000 city-pair markets that could lose on-line connecting opportunities due to the ending of the Delta-Austrian-Sabena-Swissair alliance.

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[34] See Order 99-4-17 at 19-20.

[35] See Appendix A for proposed conditions. We imposed similar conditions with respect to other alliances that would end head-to-head competition in hub-to-hub markets. For example, see Orders 99-9-9, 96-6-33, and 96-5-27.

Accordingly, we tentatively conclude that the proposed alliance will increase competition in the behind- and beyond-gateway markets.

We tentatively find that the proposed alliance will substantially benefit competition, since it will enable the partners to operate more efficiently and to provide the public with a wider variety of on-line services. As conditioned, we anticipate that the pro-competitive advantages that will be provided through an integration of the three carriers' services will outweigh any potential loss of competition in the city-pair markets where the partners now compete head-to-head. We therefore find that the proposed arrangement will not cause a substantial reduction or elimination of competition.

B. Public Interest Issues

Under Section 41309, we must determine whether the Alliance Agreements would be adverse to the public interest. Section 41308 requires a similar public interest examination. Except as noted, we tentatively find that approval of the Alliance Agreements will promote the public interest.

Open-skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wants. These agreements place no limits on the number of flights that carriers can operate, and carriers can charge any fare unless both countries disapprove it.[36]

It is in all these circumstances that we have tentatively found that approving the Alliance Agreements will benefit the traveling public, taking into account the conditions imposed by the Department, and is unlikely to reduce competition significantly in any relevant markets, and is otherwise in the public interest.

VII. Other Issues

Legend Airlines argues that American is engaged in anticompetitive behavior in the Dallas-Ft. Worth market. Legend says that American has orchestrated a campaign against it aimed at ending Legend's operations at Dallas Love Field. Legend asserts that American's behavior is contrary to the principles of deregulation and federal law. It urges the Department to defer action on this application until American ends its effort to undermine Legend's operations at Dallas Love Field.

We shall deny Legend's request. The transaction at issue here does not significantly relate to competition at Love Field, which has no international service. We have established other forums for dealing with the issues raised by Legend, and we do not believe that it would be in the public interest to delay approving a transaction that this record shows would provide substantial public benefits.

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[36] Order 92-8-13, August 5, 1992.

As a final matter, the Joint Applicants state that the proposed arrangement is not part of the Oneworld alliance, and that they have no plans to link the two.[37] Thus, our tentative evaluation of this proposed alliance did not consider the competitive affects of such a linkage. Therefore, if our decisions here are finalized, we direct the Joint Applicants to file for prior approval by the Department a copy of any agreement(s) created for the purpose of linking this proposed immunized alliance with the Oneworld global alliance.

VIII. Tentative Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that immunity is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward, and if we find that the public interest requires the grant of antitrust immunity.

The record shows that the Joint Applicants will not proceed with the Alliance Agreements without antitrust immunity.[38] The Joint Applicants claim that they cannot accomplish the public benefits that they seek to achieve through the formation of this alliance absent antitrust immunity. They state that the proposed integration of services will surely expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they indicate that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities, including scheduling, route planning, pricing, marketing, sales, and inventory control.[39]

Since the antitrust laws let competitors engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the Joint Applicants' services would be found to violate the antitrust laws. Nevertheless, the record suggests that the Joint Applicants could be subject to extensive and burdensome antitrust litigation if we did not grant their request. The record also persuades us that they will not proceed without it.

To the extent discussed above, we tentatively find that we should grant antitrust immunity to the Alliance Agreements. We also intend to review and monitor the Joint Applicants' progress in implementing the Agreements, if we approve and immunize them, in order to ensure that the partners are carrying out the arrangements pro-competitive aims. We will also require them to resubmit the Alliance Agreements for review in five years, if we make final this tentative decision to approve and immunize the Alliance Agreements.

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37 Application at 6.

38 Application at 15. Also, see Article 3.2 of each Alliance Agreement.

39 Application at 4.

While tentatively concluding that we should be approve and give immunity to the alliance, we find, as discussed next, that certain conditions are necessary to allow us to find that our actions in these matters are in the public interest.

IX. IATA Tariff Coordination Issue

Consistent with our decision in Order 96-5-26, it is contrary to the public interest to permit alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. We therefore tentatively condition our approval and grant of antitrust immunity in this case by requiring American, Sabena, and Swissair to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Belgium, between the United States and Switzerland, or between the United States and any other countries designating a carrier that has been or is subsequently granted antitrust immunity or renewal thereof by the Department for participation in similar alliances with a U.S. air carrier.[40]

We therefore have tentatively decided to condition our grant of antitrust immunity to the Alliance upon the withdrawal by the Joint Applicants from IATA tariff coordination activities affecting through prices between the U.S. and Belgium, the U.S. and Switzerland, and between the U.S. and any other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity by us. Under this condition, the Alliance partners may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Belgium, the United States and Switzerland, and between the United States and the homeland(s) of their similarly immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.[41]

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[40] This condition currently applies to prices between the United States and the Netherlands; between the United States and Italy (see Order 99-12-5 at 3); between the United States and Germany (see Order 96-5-27 at 17); between the United States and Denmark, Norway, and Sweden (see Order 96-11-1 at 23); and between the United States and Chile (see Order 99-9-9 at 21). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (*see* Dockets OST-96-1116 and OST-95-618).

[41] Under this condition, the Alliance partners could not participate in IATA discussions of the total ("through") price (see 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in Belgium, Chile, Denmark, Germany, Italy, Norway, Sweden, Switzerland, and the Netherlands, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

We tentatively find that this condition is in the public interest for a number of reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities among the Joint Applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we tentatively find supports immunity for the proposed Alliance activities is the potential for increased price competition among the Alliance partners and other carriers, particularly other international alliances. We have tentatively found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Joint Applicants to continue tariff coordination within IATA undermines such competition.

X. O&D Survey Data Reporting Requirement[42]

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for three large alliances and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make on international air service.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. Consistent with determinations in similar cases,[43] we have therefore tentatively decided to continue requiring Sabena and Swissair to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American).[44]

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[42] We will provide confidentiality protection for these data, as we do for international O&D data submitted by U.S. airlines. Although we will use these data for internal analytical purposes, we will not disclose it to any other airlines.

[43] For example, see Order 96-6-33 at 21.

[44] Consistent with our determinations in Orders 96-7-21, 96-11-1, and 99-9-9 we intend to request other foreign carrier members of immunized international alliances involving U.S. carriers to submit O&D Survey data and condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow Sabena-Swissair or other foreign carriers any access to U.S. carrier O&D Survey data.

To prevent this reporting requirement from having any anti-competitive consequences, we have tentatively decided to grant confidentiality to the Sabena-Swissair Origin-Destination reports and special reports on code-share passengers. Currently, we grant confidential treatment to international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign air carriers that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international Origin-Destination data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct the foreign partners to provide certain limited Origin-Destination data to the O&D Survey, the foreign partners are not air carriers within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." The foreign partners accordingly will have no access to the data filed by U.S. air carriers. Moreover, we will be making the Sabena and Swissair submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

XI. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the Joint Applicants have in competing CRSs. American and Swissair have had ownership and marketing ties with Sabre and Galileo, competing CRS firms. Therefore, as with the Delta Air Lines-Austrian-Sabena-Swissair arrangement (see Order 96-5-26 at 31-32) and the Northwest-KLM arrangement (see Order 92-11-27 at 16), the proposed integration of marketing operations of the Joint Applicants presents a risk that CRS competition may be reduced. In view of these factors, we tentatively find that any grant of antitrust immunity for the Alliance Agreements should exclude the Joint Applicants CRS interests and operations. We note that the Joint Applicants recognize that immunity will not extend to the American-Sabena-Swissair management of any interest they may have in individual CRSs.[45]

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[45] Application at 25.

XII. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreements could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act unless the air carriers give reasonable and timely notice to passengers of the actual operator of the aircraft.[46]

XIII. Summary

We tentatively grant approval and antitrust immunity to the Alliance Agreements, subject to the conditions described in this order. We also tentatively direct the Joint Applicants to resubmit the Alliance Agreements five years from the date of the issuance of the final order in this case. However, the Department is not authorizing American-Sabena-Swissair to operate under a common name. If the joint applicants choose to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also tentatively direct the Joint Applicants to withdraw from all IATA tariff conference activities relating to through fares, rates or charges between the United States and Belgium-Switzerland, as well as between the United States and the homeland of any other foreign carrier granted antitrust immunity or renewal thereof, by the Department for participation in similar alliance activities with a U.S. airline; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also tentatively direct Sabena and Swissair to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by American Airlines).

Objections or comments to our tentative findings are due no later than 10 calendar days from the service date of this order. Answers to objections shall be due no later than 5 business days thereafter.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval and antitrust immunity as limited and discussed by this order to the Alliance Agreements between and among American Airlines, Inc., N.V. Sabena S.A., and Swissair, Swiss Air Transport Company, Ltd., effective August 6, 2000, subject to the proposed limits and conditions indicated in Appendix A, to the extent that it applies to the Chicago-Brussels, and Chicago-Zurich markets;

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[46] See 14 C.F.R. 399.88.

2. We tentatively direct American Airlines, Inc., N.V. Sabena S.A., and Swissair, Swiss Air Transport Company, Ltd. to resubmit their Alliance Agreement(s) five years from the date of issuance of the final order in this case;

3. We tentatively direct American Airlines, Inc., N.V. Sabena S.A., and Swissair, Swiss Air Transport Company, Ltd., or any other airline involved in such arrangements, to file for prior approval a copy of any agreement(s) that may affect the American-Sabena-Swissair alliance services (including, but not limited to, the Oneworld Alliance);

4. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require American Airlines, Inc., N.V. Sabena S.A., and Swissair, Swiss Air Transport Company, Ltd. to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Belgium-Switzerland, and/or between the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that have been or are subsequently granted antitrust immunity or renewal thereof by the Department;

5. We tentatively direct N.V. Sabena S.A. and Swissair, Swiss Air Transport Company, Ltd. to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by American Airlines, Inc.);

6. We direct interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of the order described herein to file an original and five copies in Docket OST-1999-6528 and to serve a statement of such objections or comments together with any supporting evidence the commenter wishes the Department to notice on all persons on the service list in that docket no later than 10 calendar days from the service date of this order. Answers to objections shall be due no later than 5 business days thereafter;[47]

7. If parties' file timely and properly supported objections, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived; and

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[47] Service should be by hand delivery or telefax. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system. In the alternative, filers are encouraged to use the electronic submission capability through the Dockets DMS Internet site (http://dms.dot.gov) by following the instructions at the web site. For the convenience of the parties, service by facsimile is authorized. Parties should include their fax numbers on their submissions and should indicate the method of service on their certificates of services.

8. We shall serve this order on all persons on the service list in this docket.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp

PROPOSED CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE ALLIANCE AGREEMENTS BETWEEN AMERICAN AIRLINES, INC. SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD. AND N.V. SABENA S.A.

Grant of Immunity

The Department grants immunity from the antitrust laws to American Airlines, Swissair, and Sabena, and their affiliates, for their Alliance Agreements and Coordination Agreement (the "Alliance Agreements") dated November 18, 1999, between and among American, Swissair, and Sabena and for any agreement incorporated in or pursuant to the Alliance Agreements.

Limitations on Immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to unrestricted coach-class fares or any business or first-class fares for local U.S.-point-of-sale passengers flying nonstop between Chicago and Brussels and between Chicago and Zurich; or the provision by one party to the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

Exceptions to Limitations on Immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S.-point-of-sale passengers flying nonstop between Chicago and Brussels and between Chicago and Zurich: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code. For immunity to apply, however: (1) in the case of corporate fare products and group fare products, local U.S. point-of-sale non-stop traffic shall constitute no more than 25% of a corporation's or group's anticipated travel (measured in flight segments) under its contract with American-Swissair-Sabena; and (2) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city-pairs in addition to Chicago-Brussels and Chicago-Zurich.

Definitions for Purposes of this Order

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published fares, net prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (1) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (2) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, which discounts may be stated either as percentage discounts from specified published fares or net prices.

Clarification of Scope of Limitation on Immunity

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreements other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Chicago-Brussels and Chicago-Zurich routes, and the configuration of such aircraft; coordination of pricing, inventory and yield management and pooling of revenues, with respect to non-local passengers traveling on non-stop flights on the Chicago-Brussels and Chicago-Zurich routes; and the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities.

Review of Limitations on Immunity

Within eighteen months from the date that this Order becomes final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Chicago-Brussels and Chicago-Zurich markets; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.